

HOPI INDIAN TRIBE
v.
DIRECTOR, OFFICE OF TRUST AND ECONOMIC DEVELOPMENT,
BUREAU OF INDIAN AFFAIRS

IBIA 91-11-A

Decided April 7, 1992

Appeal from the denial of attorney fees requested under the Navajo-Hopi Settlement Act of 1974.

Vacated and remanded.

1. Administrative Authority: Generally--Bureau of Indian Affairs:
Generally--Indians: Generally--Statutory Construction:
Administrative Construction

In order to correct prior error, an official of the Bureau of Indian Affairs may change an administrative interpretation of a statute as long as the reason for the change is clearly set forth to show that the departure from the prior administrative position is not arbitrary or capricious.

APPEARANCES: Michael P. O'Connell, Esq., Kykotsmovi, Arizona, for the Hopi Indian Tribe; Neil McDonald, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Hopi Indian Tribe (Tribe) seeks review of a September 18, 1990, decision of the Director, Office of Trust and Economic Development, Bureau of Indian Affairs (Director; BIA), formerly the Deputy to the Assistant Secretary--Indian Affairs (Trust and Economic Development). The decision denied appellant's request for attorney fees pursuant to 25 U.S.C. § 640d-7(e) (1988). ^{1/} For the reasons discussed below, the Board of

^{1/} Section 640d-7(e) (1988) provides:

"The Secretary of the Interior is authorized to pay any or all appropriate legal fees, court costs, and other related expenses arising out of, or in connection with, the commencing of, or defending against, any action brought by the Navajo, San Juan Southern Paiute, or Hopi Tribe under [the Navajo-Hopi Settlement Act of 1974, 88 Stat. 1712, 25 U.S.C. §§ 640d through 640d-24 (1988)]."

All further references to the United States Code are to the 1988 edition.

Indian Appeals (Board) vacates that decision and remands this matter to the Director for further action.

Background

The historical background of this matter is succinctly set forth in the Director's Opening Brief at pages 3-5:

By treaty in 1868 the United States granted the Navajos an extensive reservation in the northeast corner of Arizona. 15 Stat. 667. A series of executive orders expanded the reservation between 1880 and 1918. An 1882 executive order withdrew a reservation (1882 reservation) for the Hopis "and such other Indians as the Secretary may see fit to settle thereon." Title to the land on this reservation has been extensively litigated. See Sekaguaptewa v. McDonald, 619 F.2d 801, n.1 (9th Cir. 1980), and cases cited therein. Subsequently, by the Act of June 14, 1934, 48 Stat. 960, Congress set aside a larger area of land (the 1934 reservation), which surrounded the 1882 reservation, "for the benefit of the Navajo and such other Indians as may be located thereon."

In summary, the 1934 reservation surrounded the previously existing 1882 Hopi reservation created by executive order, protected its status, and contained language that the 1934 enlarged Navajo reservation was for the benefit of "the Navajos and such other Indians as may already be located thereon." The situation created by the 1882 executive order reservation and the legislated reservation of 1934 led to disputes as to the land use rights of the Navajos, Hopis and San Juan Southern Paiutes within certain areas settled by the respective tribes. In 1974, Congress authorized a lawsuit between the Navajos and the Hopis to settle their respective rights in the 1934 reservation. * * *

The Navajo-Hopi Settlement Act of 1974 * * * authorized either the Navajo or the Hopi Tribe to sue the other tribe for a determination of the interest of the parties in the 1934 reservation. 25 U.S.C. § 640d-7. The Hopi Tribe filed suit against the Navajo Tribe in 1974. * * *

Since the Department of Justice could not represent both tribes in the authorized lawsuit, and the tribes would have had to bear all legal expenses, Congress also authorized the Secretary of the Interior "to pay any or all appropriate legal fees, court costs and other related expenses arising out of, or in connection with," the 1934 reservation litigation. 25 U.S.C. § 640d-7(e). Attorney fees, not counting extensive related litigation support expenses and costs, have been paid in the amount of \$4,878,909 for the 1934 reservation litigation * * * through Fiscal Year 1990. * * *

In 1980, Congress amended the Navajo-Hopi Settlement Act to provide further payment of attorney fees for litigation concerning the 1882 executive order reservation. [2/]

By letter dated November 7, 1989, appellant's Chairman (Chairman) wrote to the Assistant Secretary - Indian Affairs (Assistant Secretary) asking that at least \$380,000 be allocated pursuant to 25 U.S.C. § 640d-7(e) for the payment of appellant's legal fees, costs and expenses with respect to the 1934 reservation litigation. The Chairman stated that the litigation was entering its most costly phase, and noted that the Tribe had not received any allocation for the previous year. The Chairman also requested an allocation of \$160,000 under 25 U.S.C. § 640d-27(a). The letter concluded: "Please advise me if you need any other documentation from the Hopi Tribe to accommodate our request" (Letter at 2).

The Director's December 9, 1989, response to this letter states in its entirety:

This is in response to your November 7, 1989, letter regarding funds for attorney fees. The funds appropriated under P.L. 101-121 (1990 Interior Appropriations Act), will be distributed among the three tribes involved in the Navajo-Hopi dispute in accordance with the language of the Appropriation Act for each tribe.

With the exception of specific Congressional directives, tribal requests for attorney fees are determined on the basis of applications that are processed in accordance with procedures found in 25 CFR Part 89.40 through 43. [3/]
Therefore, requests

2/ See 25 U.S.C. § 640d-27(a):

"In any litigation or court action between or among the Hopi Tribe, the Navajo Tribe and the United States * * * arising out of the interpretation or implementation of this subchapter, as amended, the Secretary [of the Interior] shall pay, subject to the availability of appropriations, attorney's fees, costs and expenses as determined by the Secretary to be reasonable."

3/ The cited regulations provide procedures to be followed when an Indian tribe is paid from appropriated funds to secure private legal representation. Section 89.43(a) provides:

"A tribe * * * seeking funds under § 89.41 shall submit a written request through the Agency Superintendent and the Area Director, including

"(1) A detailed statement describing the nature and scope of the problems for which legal services are sought;

"(2) A statement of the terms, including total anticipated costs, of the requested legal services contract;

"(3) A current financial statement and a statement that the tribe does not possess sufficient tribal funds or assets to pay all or a part of the legal services sought; and

for attorney fees by the Hopi Tribe, unless Congressionally mandated, should be applied for along with other tribes.

By letter dated January 16, 1990, the Chairman replied:

Congress specifically mandated the Secretary to pay attorney fees of the Hopi Tribe involved in the Hopi-Navajo land dispute. 25 U.S.C. §§ 640d-7(e) and 640d-27. In addition, in the language of the 1990 Interior Appropriation Act and its legislative history Congress expressly directs the Secretary to provide increased attorneys fee funding from the Department's 1990 budget * * *.

* * * * *

In prior years, the Department has treated Hopi-Navajo requests for attorneys fees for these land disputes as exempt from the procedures at 25 CFR Part 89.40 through .43. For that reason, the Hopi Tribe submitted its letter of November 7, 1989 directly to [the Assistant Secretary].

The administrative record does not include any response to this letter from the Director.

On June 25, 1990, the Chairman wrote to the Hopi Agency, BIA (agency), concerning obtaining funds under section 640d-7(e). He explained at pages 1-2:

In prior years, the Secretary has made partial payment of the Hopi Tribe's legal and related litigation expenses on the basis of 25 U.S.C. § 640d-7 without special request * * *. For * * * FY 1989, the Hopi Tribe made no special application and received partial payment of at least \$190,000 * * *.

By letter to [the Assistant Secretary], dated November 7, 1989, the Hopi Indian Tribe requested \$360,000 under 25 U.S.C. § 640d-7(e) to partially cover its legal fees and expenses in the 1934 Act litigation for FY 1990. On January 16, 1990, I wrote to [the Director] explaining that the Hopi Tribe's request for these fees is exempt from the general procedures found at 25 CFR Part 89.40 because Congress has provided specific directives for the payment of these fees both in 25 U.S.C. § 640d-7(e) and the 1990 Department of the Interior Appropriation Act. Despite the Hopi Tribe's earlier letters and specific Congressional directives, I was shocked to learn that the Secretary has not yet allocated any funds to the Hopi Tribe for the 1934 Boundary Bill Act litigation for FY 1990.

fn. 3 (continued)

"(4) A statement of why the matter must be handled by a private attorney as opposed to the Department of Justice or Department of [the] Interior attorneys."

To make matters worse, I have been advised that the Department's funds for attorneys fees have already been allocated to other Tribes and that no funds or inadequate funds remain to fulfill the Hopi Tribe's partial funding request.

Inquiries on appellant's behalf by the agency Superintendent and the Phoenix Area Director resulted in notification that appellant was required to file an application under 25 CFR 89.40-.43 and that all funds for attorney fees for FY 1990 had been allocated to other tribes. After receiving this information, appellant wrote the Director on September 12, 1990, stating its disagreement with the decision requiring it to file an application for attorney fees under 25 CFR 89.40:

Commencing in FY 1990, the Bureau has refused to disburse any funds to the Tribe in support of the 1934 Act litigation, ostensibly on the ground that the Tribe did not submit an application pursuant to [25 CFR] Part 89.40. By this refusal, the Bureau has departed substantially and without explanation from its settled administrative practice whereby the government recognized that disbursements to the Hopi Tribe were to be made pursuant to the provisions of the Act and without regard to the regulations contained in Part 89.40. The Bureau has continued to provide funding in FY 1990 to the Hopi Tribe for 1882 Reservation matters without the Tribe's having submitted Part 89.40 applications.

* * * * *

* * * [T]he Hopi Tribe believes that the Bureau's failure to fund the 1934 litigation effort is contrary to law and to settled administrative practice.

The Director responded by letter dated September 18, 1990. That response states:

By my letter * * * dated December 9, 1989, the tribe was invited to submit an application for attorney fees for consideration under the procedures found at 25 CFR 89.40. This was to insure that proper consideration could be given to the payment of expenses which might be incurred in connection with 25 U.S.C. § 640d-7(e). At about the same time as the December 9 letter, the Chairman in a meeting with the Assistant Secretary * * * was advised, verbally, of the necessity for submission of an application by the Tribe so the Attorney Fee Review Committee could review that application. No application has been received to date.

Regrettably, there are no funds left in the attorney fees account for Fiscal Year 1990. You, and the Tribe, are urged to submit an application at your earliest opportunity for consideration in the Fiscal Year 1991 review cycle.

Because the Director's decision did not advise appellant of the availability of any administrative appeals, appellant requested clarification of that issue. By letter of September 25, 1990, the Director informed appellant that his decision could be appealed to the Assistant Secretary. Appellant's notice of appeal to the Assistant Secretary, dated October 23, 1990, was transferred to the Board on October 25, 1990. ^{4/} Both appellant and the Director filed briefs on appeal.

Discussion and Conclusions

Appellant presents an exhaustive analysis of the legislative history of 25 U.S.C. § 640d-7(e), attempting to show that Congress determined that the costs of this litigation should be borne by the United States, rather than by the Navajo and Hopi, and, later, San Juan Southern Paiute, Tribes. It further describes BIA's past practice of providing attorney fees under that section without treating the request as involving a discretionary determination and, therefore, without requiring the filing of an application under 25 CFR 89.40-.43.

The Director does not dispute, or even discuss, the prior administrative practice or the legislative history of section 640d-7(e). Instead, he distinguishes section 640d-7(e) from section 640d-27(a), observing that the former section "authorizes" the Secretary to pay costs, while the latter section uses the word "shall." He thus contends that section 640d-7(e) is discretionary, while section 640d-27(a) is mandatory. In support of this argument, the Director states that Congress specifically addressed the question of the discretionary nature of funding under section 640d-7(e) in the House report on the Navajo and Hopi Indian Relocation Amendments of 1988, H.R. Rep. No. 1032, 100th Cong., 2d Sess. 9 (1988):

The [House Interior] Committee notes that a substantial amount of funds have already been paid by the Secretary of the Interior to the Navajo and Hopi Tribes pursuant to section 8 of the Act [25 U.S.C. § 640d-7(e)]. The Committee wants to emphasize that this subsection is not an entitlement and therefore, the Secretary is not obligated to pay any and all legal expenses incurred by the tribes under this section. It remains true, however, that the Secretary can, in his discretion, and contingent on the availability of funds for this purpose, pay for all appropriate legal fees, court costs, and other related expenses arising out of law suits brought under this section.

The Director's brief concludes that, because section 640d-7(e) is discretionary, it was reasonable for him to require that requests for funding under it be processed through the procedures set forth in 25 CFR 89.40-.43, which apply to other requests for payment of discretionary attorney fees.

^{4/} Under 25 CFR 2.4(e), the Board has jurisdiction to review decisions issued by "a Deputy to the Assistant Secretary--Indian Affairs other than the Deputy to the Assistant Secretary--Indian Affairs/Director (Indian Education Programs)."

[1] It is settled law that an administrative agency can change its interpretation of law in order to correct prior error. Squaw Transit Co. v. United States, 574 F.2d 492 (10th Cir. 1978); FTC v. Crowther, 430 F.2d 510 (D.C. Cir. 1970); McDade v. Morton, 353 F. Supp. 1006 (D.D.C. 1973), aff'd, 494 F.2d 1156 (D.C. Cir. 1974); Noyo River Indian Community v. Acting Sacramento Area Director, 19 IBIA 63, 67 n.10 (1990); Kiowa, Comanche & Apache Intertribal Land Use Committee v. Deputy Assistant Secretary--Indian Affairs (Operations), 14 IBIA 207, 214 (1986). The Director therefore had the authority and the responsibility to correct any prior erroneous administrative interpretation of the statute. However, because persons dealing with a Federal agency are entitled to rely on prior administrative interpretations, any change in the agency's position must be fully and clearly explained in order to show that the change is not arbitrary or capricious. Bonaparte v. Commissioner of Indian Affairs, 9 IBIA 115 (1981).

In support of his conclusion that the prior administrative practice was erroneous, the Director argues that he relied not only on the language of the statute, but also on the 1988 committee report, quoted supra.

Citing, inter alia, several Supreme Court decisions concerning over-reliance on legislative history, appellant objects to consideration of the 1988 committee report. Appellant contends that there is no evidence that the statement on which the Director relies was considered by Congress because no reference to the statement appears at any other place in the legislative history. Appellant argues that the statement is also of dubious persuasive effect in light of the clear Congressional mandate in 1974, when the statute was enacted, that the United States, rather than the individual tribes, should bear the cost of this litigation.

The Board agrees with appellant that the legislative history of the 1974 statute shows that Congress determined the dispute should be resolved through the courts, and that, because the problem had been created by the United States, the United States should be responsible for the appropriate costs of the litigation. This decision was reached after extensive discussion and debate, which included examination of other alternatives for resolution of the dispute. Although the statement in the 1988 committee report supports the interpretation of section 640d-7(e) which the Director now advocates, its persuasive effect is lessened by the lack of evidence that it received the same kind of thorough consideration by Congress as did the original decision to make the United States responsible for the appropriate costs of this litigation.

Of course, the Director could have determined that the prior administrative interpretation of section 640d-7(e) was incorrect without resort to the 1988 committee report. 5/ Such a determination might have been based

5/ Because the Director does not discuss BIA's prior interpretation of section 640d-7(e), it is not entirely clear what that interpretation actually was. All that can be deduced from the record is that, under its earlier practice, BIA did not require the Navajo, Hopi, and San Juan

on the language of the section. There is no question that, as the Director contends, the language of sections 640d-7(e) and 640d-27(a) is different. Rather, the question is whether that difference has any significance.

There is no indication that BIA believed there was any significant difference between the sections from 1980, when section 640d-27(a) was enacted, through FY 1988. According to appellant's undisputed statements, requests for funding under both sections were treated alike during this time period. Furthermore, again according to appellant's undisputed statements, BIA did not distinguish between the sections when, sometime during FY 1989, it began efforts to require the filing of an application under 25 CFR 89.40-.43 for funds appellant sought under both sections. 6/

fn. 5 (continued)

Southern Paiute Tribes to submit applications under 25 CFR 89.40-.43 when they sought funding under section 640d-7(e). BIA may have believed, as appellant argues, that the section was mandatory. It is possible, however, that BIA considered the section discretionary but sufficiently sui generis to warrant distinguishing requests made under it from requests made under 25 CFR 89.40-.43.

6/ BIA discontinued this effort after receiving communications from the Hopi Agency and Phoenix Area Office. On Mar. 10, 1989, the Superintendent wrote the Area Director explaining that there was some confusion about the procedures for handling funding under sections 640d-7(e) and 640d-27(a). The memorandum states:

"When all of this information finally got to my desk, it became obvious to me, there was a lack of knowledge at the various levels as to how this process has been working.

"Essentially, the procedure is this. By specific statute, namely, 25 U.S.C. 640d-7(e) (1934 Boundary) and 25 U.S.C. 640d-27(a) (1882 Boundary), Congress authorized a process in which both the Hopi and Navajo tribes would receive a federal allocation to pay attorneys fees and costs, to settle those boundary dispute issues.

"Through the annual appropriation process, the Central Office historically has set aside funds for that purpose in compliance with these statutes and the funds have been allocated to the Navajo and Phoenix Area Offices.

* * * * *

"To my knowledge, for the past 5-8 years, the Hopi tribe has never had to request those funds or enact a resolution to receive those funds.

* * * * *

"Getting back to Fiscal Year 1989, Mr. Miller has advised us that no funds have been specifically set aside for Hopi-Navajo land issues.

"That oversight apparently occurred due to the number of new people in the central office that are unfamiliar with the above described process.

* * * * *

"If a new process is in place, we need to know what that process is by formal notification by the Assist[ant] Secretary-Indian Affairs' office."

This information was conveyed to the Director by the Area Director on Mar. 15, 1989. Because the administrative record contains no response to these memoranda from BIA Central Office, the Board has no way to assess what, if any, effect they may have had on the decision not to pursue requiring the filing of applications under 25 CFR 89.40-.43 during FY 1989.

It was not until FY 1990 that BIA drew a distinction between the sections and required appellant to file an application for funds sought under section 640d-7(e), but not for funds sought under section 640d-27(a). 7/

7/ The Agency and Area Office again objected to this interpretation of section 640d-7(e), and requested clarification of the Department's position.

A June 28, 1990, memorandum from the Superintendent to the Area Office states that Frances Joe, the Agency Tribal Operations Officer, contacted the Area Office about funding and was informed that no funds had been made available. She then

"contacted Allen Quetone of Central Office who informed her the tribe needs to submit an application for those funds. As the information was insufficient, Ms. Joe contacted [the Director, who] stated that 25 U.S.C. 640d-7(e) was a discretionary authority and reiterated the tribe needs to submit an application.

* * * * *

"When all the information was gathered, it became obvious we were never informed officially of the new process to handle 25 U.S.C. 640d-7(e).

* * * * *

"We reiterate we need to know what the new process is by formal notification from the Assistant Secretary - Indian Affairs' office."

By memorandum dated July 11, 1990, the Area Director wrote the Director, stating:

"In a telecon between [the Director] and Ms. Frances Joe * * * [the Director] requested the Hopi Tribe submit an application for federal funds to pay attorney fees pursuant to 25 U.S.C. 640d-7(e).

"During past years no application had to be submitted for consideration and the funds were automatically appropriated to the Hopi Tribe, which had become routine to the Hopi Tribe and Phoenix Area to anticipate said funds each fiscal year for the Hopi Tribe.

"It was determined that such appropriation was discretionary authority to the Assistant Secretary * * *, and for federal funds to be considered for the Hopi Tribe this fiscal year, an application must be submitted.

"We ask you bear in mind, no official notice was provided to either the tribe or the Phoenix Area Office of the tribe's required application; therefore, no application was submitted."

Finally, on Aug. 24, 1990, the Area Director informed the Superintendent:

"As you are aware, we have been attempting to get from Washington, D.C., instructions to us and the Hopi Tribe, of the need for the tribe to apply for appropriated funds for * * * 1934 Boundary litigation in accordance with 25 CFR 89.40.

"In discussing this with Allen Quetone in Washington, D.C., he advised us of a December 1989 letter to the tribe advising them of that need.

* * * * *

"* * * There is no indication the area office or agency was copied [with this letter].

* * * * *

"In any case, it appears at least the tribe was aware of the need to submit a CFR Part 89.40 application for funds for boundary litigation.

* * * * *

"Since it appears we are not going to receive anything else from Washington, D.C. regarding this issue, this transmittal is being sent to support our July 19, 1990, memorandum."

The Director alleges that this change was communicated to appellant in his December 9, 1989, letter, quoted supra. The Board has carefully reviewed the letter and finds it to be ambiguous at best. Although the letter states the general proposition that requests for discretionary attorney fees are processed under 25 CFR 89.40-.43, it twice distinguishes between requests for discretionary attorney fees and those situations in which Congress has directed or mandated the payment of attorney fees. It was, or should have been, clear to the Director that BIA's prior practice suggested that it had interpreted section 640d-7(e) to be such a Congressional directive, and that it was appellant's position that the section was such a directive. Under these circumstances, any statement indicating that the section was being interpreted as discretionary should have been carefully and clearly written in order to avoid any possibility of a misunderstanding as to intent. 8/

Furthermore, according to the evidence in the administrative record, the Director did not apply his new interpretation uniformly. Although he denied funding to appellant because it did not file an application under 25 CFR 89.40-.43, he apparently did not require the San Juan Southern Paiute Tribe to file such an application. 9/ Instead, as was appellant's, the FY 1990 request for funding from the San Juan Southern Paiute Tribe was filed with the Assistant Secretary. The record indicates that the request was then considered by the review panel established pursuant to 25 CFR 89.40-.43, without requiring a formal application under those provisions, and, apparently, without notice to the tribe that its request was being considered under those provisions. The Director has not addressed these issues.

The Director has stated his conclusion that section 640d-7(e) is discretionary. He has not, however, explained how he reached that conclusion, or why the prior administrative practice was incorrect. Neither has he uniformly applied the new interpretation to all persons similarly situated. Under these circumstances, the Board cannot hold that the Director has adequately explained his departure from the prior administrative practice. See Bonaparte, supra. His decision must, therefore, be vacated, and this matter remanded to him for further consideration. 10/

8/ The Director also contends that appellant's Chairman was verbally informed of the necessity of submitting a request under 25 CFR 89.40-.43 at about the same time. No notes were kept concerning the meeting. Appellant denies that any such requirement was discussed. Because of the Board's disposition of this matter, it finds that resolution of this dispute is unnecessary.

9/ The record does not indicate whether the Navajo Nation filed a request for attorney fees under section 640d-7(e) for FY 1990. It indicates only that the Nation did not receive funds under that section for FY 1990.

10/ Because of this holding, the Board does not address appellant's remaining arguments.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the September 18, 1990, decision of the Director, Office of Trust and Economic Development, is vacated, and this matter is remanded to him for further consideration in accordance with this opinion.

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge